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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA
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9 United States of America,) CR 92-113-PHX-FJM
10 Plaintiff,) **ORDER**
11 vs.)
12)
13 Martel Alvarez Chavez,)
14 Defendant.)
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17 The court has before it Chavez' "Petition for a Writ *Audita Querela*" (doc. 304), the
18 governments "Response", and Chavez' "Reply."

19 Chavez seeks relief under a writ of *audita querela* from his life sentence. He argues
20 that his sentence was based upon mandatory Guidelines held unconstitutional in *United*
21 *States v. Booker*, 543 U.S. 220, 125 S. Ct. 738 (2005). The United States argues that *Booker*
22 is not retroactive and that there are no extraordinary circumstances in this case within the
23 meaning of *Carrington v. United States*, 503 F.3d 888, 893 (9th Cir. 2007).

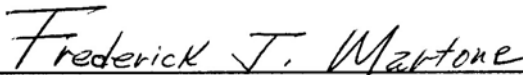
24 It seems plain that under *Carrington*, Chavez is "not entitled to relief on collateral
25 review, however it is labeled." 503 F.3d at 890. This is so because a writ of *audita querela*
26 is not available where a claim would be cognizable in a § 2255 habeas petition. The limits
27 on habeas petitions "do not create a 'gap' in the post-conviction landscape." *Id.* The court
28 also noted that, of course, *Booker* does not apply to cases on collateral review. And while

1 the court alluded to the possibility that there might be relief available “in a particular case
2 upon a showing of truly extraordinary circumstances and equities.” *Id.* at 893, Chavez makes
3 no such case here.

4 Moreover, and perhaps more importantly, the premise upon which Chavez’ petition
5 is based is incorrect. His argument is based upon mandatory Guideline application. But the
6 life sentence in this case was mandatory under 21 U.S.C. § 841 and thus the mandatory
7 statutory sentence replaced the Guideline in his case. The Guidelines, even when mandatory,
8 were always subordinate to the statute.

9 Accordingly, IT IS ORDERED DENYING Chavez’ “Petition for a Writ of *Audita*
10 *Querela*” (doc. 304).

11 DATED this 3rd day of September, 2008.

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 Frederick J. Martone
16 United States District Judge
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